Supreme Court, U.S.
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No. 05-05-610

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In The
Supreme Court of the United States

WILLIAM HARRY WILSON,

Petitioner,

v.

DELTA STATE UNIVERSITY, *et al.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 704(a) of Title VII of the 1964 Civil Rights Act forbids discrimination against an employee "because he has opposed any practice made an unlawful employment practice by" Title VII. Twelve circuits have held that section 704(a) prohibits retaliation against an employee who reasonably believed that the practice which he or she opposed was forbidden by Title VII. The Questions Presented are:

(1) Does section 704(a) protect an employee who reasonably but mistakenly believed the practices he or she opposed were unlawful if that mistake was based on an error of *law*.

(2) Does an individual who opposed practices he or she believed were unlawful under Title VII lose the protections of section 704(a) retroactively if the court of appeals holds, *after* the individual objected to those practices, that the practices in question did not violate Title VII?

PARTIES

The petitioner is William Harry Wilson.

The respondents are Delta State University, Dr. David Potter, in his official capacity as President of Delta State University, The Board of Trustees of State Institutions of Higher Learning, Dr. Thomas D. Layzell, in his official capacity as Commissioner of the Board of Trustees of State Institutions of Higher Learning, and Thomas W. Colbert, William S. Crawford, Ricki Garrett, J. Roy Klumb, Dr. D. E. Magee, Jr., Virginia Shanteau Newton, Dr. L. Stacy Davidson, Jr., Bryce Griffis, Dr. Bettye H. Neely, Scott Ross, Amy Whitten and Carl Nicholson, Jr., in their official capacities as members of the Board of Trustees of State Institutions of Learning.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William Harry Wilson respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on August 12, 2005.

OPINIONS BELOW

The August 12, 2005 opinion of the court of appeals, which is reported at 143 Fed. Appx. 611, is set out at pp. 1a-7a of the Appendix. The August 24, 2004 order of the district court, which is not officially reported, is set out at pp. 8a-11a.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on August 12, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 704(a) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this title. . . .

STATEMENT OF THE CASE

This case arose out of a controversy regarding the position of Chief Information and Planning Officer at Delta State University. Petitioner Wilson had been employed at Delta State since 1983. In 1995 Wilson completed his Ph.D. dissertation at Delta State; that dissertation proposed the creation of an administrative position at the university to coordinate certain information technology and planning functions.

In the fall of 2000 Delta State created the very position that Wilson had proposed, which the university titled Chief Information and Planning Officer. University officials, however, did not announce the vacancy in that newly created job, or permit university employees or others to apply for it. Instead, the university summarily appointed Dr. Michelle Roberts to the position. Dr. Wilson had hoped to obtain this new position if and when it was established, and objected to the manner in which it was awarded to Roberts.

On April 20, 2001, Wilson met with the university president, Dr. David Potter, to discuss a number of matters. During the course of that discussion Wilson complained about the appointment of Roberts. Wilson asserted that the university had violated its own rules by failing to advertise the position, and argued that Roberts was not competent to do the job. Wilson further objected that Roberts had only been given the job because she had had (or was having) a romantic relationship with a university administrator who was involved in the appointment decision. (App. 2a).

Shortly thereafter, for reasons that remain in dispute, university officials decided to dismiss Dr. Wilson. On June

29, 2001, Dr. Potter informed Wilson that his position was being eliminated and that his contract would not be renewed. Wilson's employment at Delta State ended on July 1, 2001. Shortly thereafter, Wilson contended, Delta State created a new position that was essentially the same as Wilson's old job, and then filled it with a new employee.

On November 28, 2001, Dr. Wilson filed a charge with the EEOC, alleging that the appointment of Dr. Roberts was the result of gender-based discrimination,[1] and that Wilson had been dismissed in retaliation for having opposed that discrimination. While Wilson's charge was pending at the EEOC, the Fifth Circuit on May 15, 2002, decided *Green v. Administrators of the Tulane Educational Fund*, 284 F.3d 642 (5th Cir. 2002). *Green* contained a footnote which stated in part:

> courts have held that when an employer discriminates in favor of a paramour, such an action is not sex-based discrimination, as the favoritism, while unfair, disadvantages both sexes alike for reasons other than gender.

284 F.3d at 656 n.6. *Green* cited no Fifth Circuit decisions on this issue; the footnote referred only to decisions in the Second and Eleventh Circuits. Footnote 6 neither applied nor endorsed the decisions of those other circuits. Rather, the Fifth Circuit in *Green* insisted that those cases were distinguishable from the circumstances of *Green* itself, and concluded that the adverse actions complained of in that case were unlawful. *Id.*

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[1] This underlying discrimination claim was dismissed by the district court on the ground that it was filed more than 180 days after the alleged discriminatory appointment had been made.

Wilson commenced this action on November 21, 2002 against Delta State University and several of its officials. His complaint alleged, inter alia, that he had been dismissed for opposing gender-based discrimination. Eight months later, the Fifth Circuit on August 1, 2003, squarely faced the question of whether favoritism for a paramour constitutes discrimination on the basis of gender, and held that such favoritism is not unlawful under Title VII. *Ackel v. National Communications, Inc.*, 339 F.3d 376, 382 (5th Cir. 2003).

On June 21, 2004, Delta State filed an in limine motion regarding the admissibility of certain evidence at trial. On July 24, 2004, Delta State submitted a supplementary brief which for the first time cited *Ackel*, and argued that Wilson's actions were not protected activity under section 704(a). With the trial scheduled to begin in early August, the district judge denied the in limine motion.

On August 4, 2004, at the end of the plaintiff's case, Delta State moved for a directed verdict. Delta State argued that Wilson's action in criticizing the appointment of Roberts was not protected activity under Title VII because, the defendant contended, the favoritism for a paramour that Wilson had opposed does not constitute discrimination on the basis of sex. Counsel for plaintiff contended that Wilson's action was protected by section 704(a) so long as Wilson had a reasonable good faith belief that the preferential treatment in question constituted gender-based discrimination. The district judge granted the directed verdict motion from the bench.

Three weeks later, on August 24, 2004, the district judge issued a written Order reiterating its decision to

award judgment as a matter of law.[2] The district judge, relying on *Ackel*, held that Wilson's criticism of the appointment of Roberts did not constitute protected activity under section 704(a) because the preferential actions to which he objected were permitted by Title VII.

> [T]he court is of the opinion that the plaintiff did not engage in protected action in his conference with Dr. Potter. . . . Preferential treatment of a paramour, while obviously unfair, is not gender discrimination for the simple reason that such treatment discriminates not only against men but also against all other women in the world except the one paramour. *Ackel v. Nat'l Communications, Inc.*, 339 F.3d 376, 382 (5th Cir. 2003) (citing *Green v. Administrators of the Tulane Educational Fund*, 284 F.3d 642, 656 n.6 (5th Cir. 2002)).

(App. 9a-10a).

On appeal, Wilson argued that his objections to the Roberts appointment was protected activity so long as he reasonably believed that Delta State's actions constituted unlawful discrimination on the basis of gender.[3] Wilson relied on longstanding Fifth Circuit case law holding (as have eleven other circuits) that a plaintiff can invoke the anti-retaliation protections of section 704(a) without establishing that the employer had actually engaged in unlawful discrimination, so long as the plaintiff at the

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[2] The order states that "[t]he court . . . is ready to rule on the motion of the defendants for judgment as a matter of law." (App. 8a). This is somewhat misleading; the district court had actually ruled on that motion on August 4, 2004, and was simply explaining the basis of its earlier decision.

[3] Brief of Appellant, *Wilson v. Delta State University*, No. 04-60759 (5th Cir.), pp. 16-18.

time of his or her opposition had a "reasonable belief" that the employer was violating Title VII. *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 427-28 (5th Cir. 2000); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. Unit A 1981).

The Fifth Circuit rejected this interpretation of section 704(a). It held that section 704(a) protects only an employee whose reasonable (but mistaken) belief that his or her employer was violating Title VII was based on an error of fact, and does not protect employees who had made an error of law.

> *Payne* involved an employee who believed the employer was engaged in an actual unlawful practice, even while *in fact*, the employer may not have been so engaged. This Court held in *Payne* that it was not fatal to the plaintiff's retaliation case that he failed to prove that the employer was actually discriminating against blacks in retail store opportunities. [654 F.2d] at 1137.
>
> *Payne* does not involve an employee who believes that an employer is engaged in an unlawful practice although that practice *is not actually unlawful, which is the situation here*.

(App. 5a-6a) (Emphasis added). When he met with Dr. Potter in April 2000 Dr. Wilson believed that favoritism for a paramour was gender-based discrimination. But, the Fifth Circuit held, Wilson's 2000 opposition to that practice was unprotected in light of the August 2003 decision in *Ackel* that authoritatively determined that such preferential treatment did not constitute gender-based discrimination within the scope of Title VII.

> The practice of which Wilson complained, that Roberts was unqualified and was hired because

> of an affair, is not a practice made unlawful by Title VII. . . . *Ackel v. Nat'l Communications, Inc.* . . . Because it is settled law in this Circuit that such paramour favoritism does not run afoul of Title VII, *id.*, Wilson's alleged belief to the contrary could not have been reasonable.

(App. 6a-7a). Under the decision of the Fifth Circuit, it was of no consequence that the legality of paramour favoritism only became "settled law in this Circuit" when the issue was decided in 2003 in *Ackel*, more than two years *after* Wilson had engaged in the assertedly protected activities.

REASONS FOR GRANTING THE WRIT

THERE IS AN IMPORTANT INTER-CIRCUIT CONFLICT REGARDING THE SCOPE OF THE ANTI-RETALIATION PROVISION OF SECTION 704(a) OF TITLE VII

Section 704(a) of Title VII prohibits employers from retaliating against an employee because he or she "opposed any practice made an unlawful employment practice by this title." 20 U.S.C. § 2000e-3(a). Essentially identical anti-retaliation provisions are contained in the Americans With Disabilities Act,[4] the Age Discrimination in Employment Act,[5] and the Family and Medical Leave Act.[6]

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[4] 42 U.S.C. § 12203(a) ("No person shall discriminate against any individual because such individual opposed any act or practice made unlawful by this Act. . . .")

[5] 29 U.S.C. § 623(d) ("It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section. . . .")

[6] 29 U.S.C. § 2615(a)(2) ("It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.")

These prohibitions are critical to ensuring that employees can without fear of retaliation object to their employers about discrimination. As is the case with regard to Title IX, compliance with Title VII

> "would be difficult, if not impossible to achieve if persons who complain about sex discrimination did not have effective protection against retaliation." Brief for the United States as *Amicus Curiae* 13. If recipients were permitted to retaliate freely, individuals who witness discrimination would be loath to report it, and all manner of violations might go unremedied.

Jackson v. Birmingham Board of Education, ___ U.S. ___, 125 S.Ct. 1497, 1508 (2005); *see id.* at 1513 (Thomas, J., dissenting) ("protection from retaliation . . . serves as a prophylactic measure to guard the primary right.") Title VII seeks to encourage employees to resolve discrimination complaints with their employers informally, without resort to litigation or even EEOC intervention. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (noting "EEOC's policy of encouraging the development of grievance procedures.")

Twelve circuits hold that section 704(a) does not require employees to prove *both* that they were retaliated against *and* that the employer had actually engaged in a separate act of unlawful discrimination.[7] In every

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[7] *Wyatt v. City of Boston*, 35 F.3d 13, 18 (1st Cir. 1994); *Manoharan v. Columbia Coll. of Physicians & Surgeons*, 842 F.2d 590, 592 (2d Cir. 1998); *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 865 (3d Cir. 1990); *Crowley v. Prince George's County*, 890 F.2d 683, 687 (4th Cir. 1989); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981); *Holden v. Owens-Illinois, Inc.*, 793 F.2d 745, 751 (6th Cir. 1986); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*,

(Continued on following page)

geographical circuit, a section 704(a) claimant need only show that he or she could reasonably have believed that the actions which he or she opposed were unlawful under Title VII.[8] The expression of opposition to discrimination is protected activity under Title VII so long as the employee could reasonably have believed that unlawful discrimination had occurred.

This interpretation of section 704(a) is vital to the implementation of Title VII. First, employees rarely know for certain whether their employers are violating the law; few employees would be brave enough to object to what appeared to be discrimination if they knew they could legally be fired for that complaint if it turned out that their employer had not actually violated Title VII.[9]

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224 F.3d 701, 704 (7th Cir. 2000); *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 358 (8th Cir. 1997); *Sias v. City Demonstration Agency*, 588 F.2d 692, 694-95 (9th Cir. 1978); *Zinn v. McKune*, 143 F.3d 1353, 1362 (10th Cir. 1998); *Bigge v. Albertson's, Inc.*, 894 F.2d 1497, 1501 (11th Cir. 1990); *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1019 (D.C. Cir. 1981).

[8] In *Clark County School District v. Breeden*, 532 U.S. 268, 270 (2001), this Court noted but did not address the correctness of this interpretation of Title VII.

[9] The employer in *Clark County School District v. Breeden*, 532 U.S. 268 (2001), correctly explained that the courts of appeals have construed section 704(a) in this manner out of concern that limiting the application of that anti-retaliation provision to employees who could prove the correctness of their original claim of discrimination "would chill use of informal means to resolve claims by employees lacking the sophistication to interpret Title VII or predict the law." Petition for Writ of Certiorari, *Clark County School District v. Breeden*, No. 00-866, p. 18.

Second, in many retaliation cases which reach the federal courts, the original claim of discrimination is no longer being pursued; the employee may have decided to drop the discrimination claim because it is less important than the retaliation (e.g., because the employee was dismissed for complaining about a discriminatory but minor salary difference), or that discrimination claim itself might be time barred. If section 704(a) prohibited only opposition to *actual* discrimination, every section 704(a) lawsuit would also have to determine the merits of the separate discrimination controversy that triggered the retaliation. Even when a plaintiff does assert both a discrimination and a retaliation claim, it frequently occurs that the plaintiff is able to present substantial evidence only regarding the retaliation claim.[10]

Third, with regard to harassment claims, a Title VII plaintiff may be barred from obtaining relief for the discrimination itself if he or she "unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. at 765. But if section 704(a) permits an employee to fire workers who object to harassment that a court later determines was not serious enough

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[10] *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 762 (2d Cir. 1998):

> It sometimes happens – more frequently than might be imagined – that an employee whose primary claim of discrimination cannot survive pre-trial dispositive motions is able to take to trial the secondary claim that he or she was fired or adversely affected in retaliation for asserting the primary claim.

Even where a plaintiff succeeds in getting to trial on both claims, it is not uncommon for the plaintiff to prevail only on the retaliation claim.

to violate Title VII, harassment victims will justifiably be afraid to complain about harassment in the manner required by *Ellerth*.

> Without protection from retaliation, individuals who witness discrimination would likely not report it, [harassment] claims would be short-circuited, and the underlying discrimination would go unremedied.

Jackson v. Birmingham Board of Education, 125 S.Ct. at 1508.

There are two distinct types of situations in which a plaintiff asserting a section 704(a) retaliation claim might reasonably but incorrectly believe that the actions he or she opposes are forbidden by Title VII.

> The practice opposed may not constitute a violation of Title VII through two types of mistakes: a mistake of fact or a mistake of law. As an example of a mistake of fact, the person opposing the practice may claim racial discrimination in the discharge of a black co-worker. If in fact the co-worker was discharged for a legitimate reason, and race played no part, the person in question would have made a mistake of fact. . . . An example of a mistake of law would be where the plaintiff fully understood the facts, but the facts simply did not constitute a violation of Title VII.

B. Schlei and P. Grossman, Employment Discrimination Law, p. 543 n.38 (2d ed. 1983). The courts of appeals are in agreement that a retaliation victim can bring a section 704(a) action despite a good faith reasonable error of fact. The Question Presented is whether an error of law on the part of such a retaliation victim, unlike an error of fact, places the employee outside the protections of section 704(a).

I. THE COURTS OF APPEALS DIFFER AS TO WHETHER SECTION 704(a) PROTECTS AN EMPLOYEE WHO MISAPPREHENDS WHETHER TITLE VII FORBIDS THE PREFERENTIAL ACTIONS WHICH HE OR SHE OPPOSES

This case presents a multi-faceted conflict regarding whether the anti-retaliation protections of section 704(a) are unavailable to employees who misapprehend whether a preferential employment practice to which they object is or is not a violation of Title VII.

This conflict has its roots in a sharp disagreement about whether employees are required, at their peril, to know the correct interpretation of Title VII's prohibition against discrimination. The Eleventh Circuit holds that an employee's belief that an employer has violated Title VII is inherently unreasonable whenever, under the court's construction of Title VII, that belief is incorrect, regardless of whether or why the employee was unaware of that interpretation.

> The plaintiffs . . . argue that when judging the reasonableness of their belief, we should not charge them with substantive knowledge of the law. . . . We reject the plaintiffs' argument because it would eviscerate the objective component of our reasonableness inquiry.

Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1388 n.2 (11th Cir. 1998). On the other hand, the Ninth Circuit holds that in determining whether a retaliation victim could reasonably believe his or her employer had violated Title VII, the courts must "mak[e] due allowance . . . for the limited knowledge possessed by most Title VII plaintiffs about the . . . legal bases of their claims." *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994); *see Darmanin v.*

San Francisco Fire Dept., 46 Fed. Appx. 394, 395 (9th Cir. 2002) (same); *Strother v. Southern California Permanente Medical Group*, 79 F.3d 859, 869 (9th Cir. 1996) (same).

This underlying disagreement has spawned a well-established inter-circuit conflict. Three circuits, including the Fifth, hold that section 704(a) does not protect a retaliation victim who did not know the relevant judicial interpretation of Title VII, even where – as here – the precedent relied on was only issued *after* the employee had engaged in the activity triggering that retaliation. Four circuits hold, to the contrary, that the protections of section 704(a) are available despite an error of law, at least where the controlling judicial interpretation of Title VII was established subsequent to the assertedly protected activity. Two circuits, including the Ninth, hold that – regardless of how clear the caselaw may have been at the time of the assertedly protected activity – that activity will still be protected if it would not have been clear to a layman that the actions in question would not constitute unlawful discrimination. The Eleventh Circuit rejects making such allowance for the limited legal knowledge of non-attorneys.

(a) In the instant case, Delta State argued that an error of law was fatal per se to a section 704(a) claim; opposition to employer actions that did not violate Title VII, it asserted, simply is not protected activity.[11] The Fifth Circuit agreed.

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[11] Brief for Appellees, No. 04-60759 (5th Cir.), p. 17:

> Even if Plaintiff's allegations were correct, the appointment of Dr. Roberts because of her relationship is not, as a matter of law, an '"unlawful employment practice" under Title VII.

(Continued on following page)

The court of appeals had earlier held that section 704(a) protects an employee who had a "reasonable belief" that the opposed practice was unlawful. *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. Unit A 1981). The court below insisted that the "reasonable belief" rule applies only to errors of fact, not to errors of law.

> *Payne* involved an employee who believed the employer was engaged in an actual unlawful practice, even while *in fact*, the employer may not have been so engaged. This Court held in *Payne* that it was not fatal to the plaintiff's retaliation case that he failed to prove that the employer was actually discriminating against blacks in retail store opportunities. [654 F.2d] at 1137.
>
> *Payne* does not involve an employee who believes that an employer is engaged in an unlawful practice although that practice *is not actually unlawful, which is the situation here*.... Whether Wilson believed to the contrary is immaterial.

(App. 5a-6a) (Emphasis added). "Wilson's alleged belief to the contrary could not have been reasonable," the Fifth Circuit held, because under *Ackel v. National Communications*, 339 F.3d 375 (5th Cir. 2003) "it is settled law in this Circuit that such paramour favoritism does not run afoul of Title VII." (App. 6a-7a). *Ackel*, of course, was decided two years *after* the opposition activity in question in this case. Under the decision below, however, an error of law is

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See, Ackel, 339 F.2d at 382.... Therefore, Plaintiff's speaking out in opposition to Dr. Roberts' appointment six months after the fact is not protected activity under Title VII.

unreasonable per se so long as the legal issue in question is decided by the court of appeals in favor of the employer prior to the end of the section 704(a) litigation.

In *Robben v. Runyon*, 2000 WL 123421 (10th Cir. 2000), the Tenth Circuit took a similar approach. The district court in that case had rejected the plaintiff's section 704(a) claim on the ground that "a plaintiff may not maintain a retaliation claim under Title VII where the alleged conduct that is the subject of the complaint, even if true, is not actionable under Title VII." *Robben v. Runyon*, 1998 WL 92237 at *7 (D.Kan. 1998). The Tenth Circuit expressly adopted the reasoning of the district court. *Robben v. Runyon*, 2000 WL 123421 at *4. The Department of Justice correctly reads the Tenth Circuit decision in *Runyon* to hold that opposition activity is never protected by section 704(a) unless the disputed practices are in fact unlawful under Title VII.[12] Judge Murphy dissented in *Robben*, arguing that this narrow

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[12] Defendant's Motion for Summary Judgment and Brief in Support Thereof, *Mattioda v. Caldera*, No. 00-CV-772-E(J) 2001 WL 34782190 (N.D. Okl. 2001) at 14-16:

> [W]e do not here have a case of opposition activity under Title VII – the underlying activity of which Plaintiff complained, if proven, is not made unlawful by Title VII. . . . [N]ot only must one have had a reasonable good faith belief that the defendant was engaging in discrimination, one must also show that the activity complained of (whether proven or not) is made unlawful by Title VII. . . . It is apparent that the good faith belief requirement comes into play only after a determination that the practice opposed, whether proven or not, is made unlawful by Title VII.

See Mattioda v. White, 323 F.3d 1288, 1293 (10th Cir. 2003).

interpretation of section 704(a) would deter informal efforts to enforce Title VII:

> With no exceptions for a plaintiff-employee's good faith, the rule employed by the majority ties the validity of the retaliation claim to the *legal* validity of the underlying Title VII claim. . . . The efficacy of Title VII as a bulwark against discrimination is thus diminished. . . . "Determining whether there is an actual violation can mislead even an experienced district court, and a sensible employee who knew he had a right to enjoy whistleblower protection would think twice about reporting conduct which might turn out to be lawful." *Sapperstein v. Hager*, 188 F.3d 853, 857 (2d Cir. 1999).

2000 WL 123421 at *5 (Emphasis added).

The Fourth Circuit decision in *Mayo v. Kiwest Corp.*, 1996 WL 460769 (4th Cir. 1996), is a particularly striking application of this constricted reading of section 704(a). The plaintiff in that case asserted that he had been fired for objecting to same-sex sexual harassment. Plaintiff contended that it was reasonable to believe that same-sex sexual harassment was unlawful, even if the harasser was not a homosexual, because EEOC had construed Title VII in precisely that manner in its Compliance Manual and in an earlier administrative determination. 1996 WL 460769 at *5. The Fourth Circuit held that the plaintiff could not reasonably have believed the harassment violated Title VII, and that the plaintiff thus was not protected by section 704(a) because (in the view of the court of appeals) the EEOC had itself misinterpreted the prohibitions of Title VII.

> To the extent these two EEOC pronouncements can be read to interpret Title VII as providing a cause of action for the victim of the kind of heterosexual male-on-heterosexual-male conduct alleged by Mayo, we conclude such an interpretation is *irrational*. . . . Owning no deference to the EEOC's irrational interpretation of Title VI[I] . . . , we reject Mayo's reliance on such an interpretation as unreasonable.

Id. (Emphasis added). The retaliatory dismissal of Mayo was therefor permitted by section 704(a). Two years after the Fourth Circuit held that the EEOC interpretation was irrational, and that Mayo's belief he was opposing a Title VII violation was thus incorrect and thus could not have been reasonable, this Court unanimously held the very conduct which Mayo had opposed was indeed unlawful under Title VII. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).

(b) Four circuits hold that an employee's belief that he is opposing an unlawful practice cannot be rendered unprotected by section 704(a) after the fact by a *subsequent* judicial determination regarding the legality of the practice at issue.

In *Berg v. La Crosse Cooler Company*, 612 F.2d 1041 (7th Cir. 1980), the plaintiff had been fired in April 1976 because she had objected to the fact that her employer's disability leave program did not cover pregnancy-based disability. Nine months after Berg's dismissal, this Court held that the employer's actions in refusing to cover pregnancy-related disability was permissible under Title VII. *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). The district court then dismissed Berg's retaliation claim, reasoning that

> [e]ven though the Supreme Court interpreted the statute after the discharge, that Court's interpretation meant, as the district court phrased it, that defendant's program was not unlawful "at the time."

612 F.2d at 1045. The Seventh Circuit rejected the district court's view that section 704(a) protects only opposition to practices which the courts later determine to be unlawful, holding that such a reading.

> . . . undermines Title VII's central purpose, the elimination of employment discrimination by informal means; destroys one of the chief means of achieving that purpose, the frank and nondisruptive exchange of ideas between employers and employees; and serves no redeeming statutory or policy purposes of its own. Section [704(a)] plays a central role in effectuating these objectives. By protecting employees from retaliation, it is designed to encourage employees to call to their employers' attention discriminatory practices of which the employer may be unaware or which might result in protracted litigation to determine their legality if they are not voluntarily changed. . . .
>
> The plaintiff . . . should not be burdened with the sometimes impossible task of correctly anticipating how the Supreme Court may interpret a particular statute.

612 F.2d at 1045.

A similar problem concerning an intervening decision of this Court arose in *Parker v. Baltimore and Ohio R.R. Co.*, 652 F.2d 1012 (D.C. Cir. 1981). The plaintiff in that case had in the years 1976-78 repeatedly complained to his employer that its affirmative action plan was discriminatory. Six months after the plaintiff brought suit under

Title VII, this Court decided *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), which largely resolved in favor of the employer Parker's challenge to that affirmative action plan. Parker then moved to amend his complaint to assert a retaliation claim under section 704(a); the district refused to permit such an amendment on the ground that Parker's opposition to B&O's affirmative action plan would not be protected by Title VII if that plan itself was lawful. The District of Columbia Circuit reversed.

> We reject this interpretation of the opposition clause, because making the protected nature of an employee's opposition to alleged discrimination depend on the ultimate resolution of his claim would be inconsistent with the remedial purposes of Title VII. . . .
>
> [B]y extending protection to employees who oppose discriminatory practices without recourse to EEOC, Congress encouraged voluntary internal attempts to remedy discrimination. The remedial purposes of Title VII would be ill served by telling employees . . . that internal opposition, though encouraged, is undertaken "at the accuser's peril." . . .
>
> B&O argues that most of the cases rejecting a narrow reading of the opposition clause are inapposite here, because they involve mistakes "of fact" rather than mistakes "of law." . . . [W]e find the suggested distinction irrelevant to the purposes of section 704(a). Characterization of the employee's mistake as one of fact or of law affects neither the employee's interest in action on his beliefs nor the employer's interest in asserting legitimate management prerogatives. . . . [A] layperson should not be burdened with the

> "sometimes impossible task" of correctly anticipating how a given court will interpret a particular statute.

652 F.2d at 1020.

The Third Circuit has also held that retaliation victims are protected under circumstances similar to those in the instant case. In *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853 (3d Cir. 1990), the plaintiff had objected in 1984-85 to problems that arose out of a romantic relationship between the plaintiff's supervisor and one of the plaintiff's subordinates; that complaint led to a series of retaliatory actions against Drinkwater. Drinkwater filed suit in state court under the New Jersey anti-discrimination statute; she alleged both employment discrimination (arising out of the romantic relationship) and unlawful retaliation. The defendant removed the case to federal court. In 1990, while the case was pending in the district court, the New Jersey Supreme Court interpreted the New Jersey law in a manner that foreclosed Brinkwater's discrimination claim as a matter of law. The federal courts determined that the New Jersey courts would apply Title VII standards in resolving Brinkwater's remaining retaliation claim. 904 F.2d at 865. The Third Circuit held that under Title VII standards the retaliation claim was still viable, even though the practices which the plaintiff had opposed in 1984-85 had been held, in 1990, to be lawful.

> In determining the reasonableness of plaintiff's belief that she was being discriminated against, it is necessary to look first to the pre-existing case law. *See, e.g., Berg v. LaCross Cooler Co.*. . . . [T]he fact that, when plaintiff began her lawsuit. there was conflicting authority (in different [federal] circuits) on whether a female plaintiff could

> survive summary judgment by alleging that she was denied a job because of a consensual sexual relationship between a supervisor and a co-worker, certainly would support a finding that plaintiff was reasonable in believing that she had a claim. Plaintiff is not required to guess the outcome of New Jersey law correctly, *ex ante*.

904 F.2d at 865-66.

In the instant case the Fifth Circuit attempted to distinguish decisions like *Berg* by asserting that "the pregnancy issue *was* an unsettled question of law before the *General Electric* decision" (App. 7a n.2) (emphasis added), whereas the legality of paramour favoritism "*is* settled law in this Circuit." (App. 6a-7a) (emphasis added). The difference in the tense in these two passages illustrates precisely the conflict between the decision below and the decisions in the Third, Seventh, Eighth, and District of Columbia Circuits. Those circuits hold, at the least, that opposition activity is protected by section 704(a) if the law regarding the legality of the practices being opposed was not authoritatively settled *before* the plaintiff opposed the practices in question; in the decision below, Wilson's conduct was deemed unprotected because the legality of the practice that he opposed had became settled law in the Fifth Circuit *after* Wilson's actions. That is precisely the circumstance which four circuits hold cannot affect the viability of a retaliation claim.

(c) Decisions in the Ninth and Second Circuits conflict with the decision below on a separate issue.

The Ninth Circuit holds that, regardless of how clear the case law might have been at the time of the assertedly protected activity, courts must "mak[e] due allowance . . .

for the limited knowledge possessed by most Title VII plaintiffs about the . . . legal bases of their claims." *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1995). The Ninth Circuit applied this construction of section 704(a) in *Trent v. Valley Electric Assoc.*, 41 F.3d 524 (9th Cir. 1994). Trent had been fired when she complained about sexual harassment by an outside consultant who had been hired by her employer. The district court dismissed Trent's retaliation claim on the ground that Title VII did not apply to or forbid sexual harassment by an outside consultant. 41 F.3d at 526. In reinstating that retaliation claim, the Ninth Circuit thought it unnecessary to decide whether harassment by an outside consultant is or is not actually forbidden by Title VII; the retaliation claim was viable so long as Trent could have reasonably believed that such harassment was unlawful.

> [A] plaintiff does not need to prove that the employment practice at issue was in fact unlawful under Title VII. To establish the first element of a prima facie case, Trent must only show that she had a "reasonable belief" that the employment practice she protested was prohibited under Title VII. . . . To find that Title VII's opposition clause only protects those who can prove that the conduct at issue *is actually unlawful* "would not only chill the legitimate assertion of employee rights under Title VII but would tend to force employees to file formal charges rather than seek conciliation or informal adjustment of grievances." *Sias [v. City Demonstration Agency]*, 588 F.2d [692,] 695 [(9th Cir. 1978).

41 F.3d at 526.

In *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759 (2d Cir. 1998), the plaintiff alleged both that she had been

sexually harassed and that she had been dismissed for complaining about that harassment. The Second Circuit concluded that the incidents of harassment, while "obviously offensive," were too isolated and discrete to constitute unlawful sexual harassment. 159 F.3d at 768. But although the incidents were insufficient as a matter of law to violate Title VII, the court of appeals held that the incidents were sufficiently serious that the plaintiff could reasonably have believed that they were illegal.

> [I]t is possible for an employee to reasonably believe that specified conduct amounts to harassment, even when that conduct would not actually qualify as harassment under the law. . . . Though we held above that Quinn has failed to adduce facts sufficient to establish Green Tree's liability for sexual harassment, we are satisfied that her complaints of sexual harassment . . . included sufficient evidence to sustain a good faith, reasonable belief that Green Tree stood in violation of the law.

159 F.3d at 769. The section 704(a) claim was viable because a layman could not have been expected to be familiar with the Second Circuit sexual harassment precedents under which the harassment claim was ultimately dismissed.

The standard announced by the Fifth Circuit in the instant case makes no such allowance for the obvious limitations on the understanding of ordinary workers of the complexities of Title VII caselaw. And the Eleventh Circuit expressly precludes consideration of such limitations on the actual legal knowledge of employees. *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385, 1388 n.2 (11th Cir. 1998).

II. THE QUESTION PRESENTED IS OF SUBSTANTIAL IMPORTANCE TO THE ENFORCEMENT OF TITLE VII

The decision below poses a serious threat to the utilization of the informal complaint and grievance mechanisms which Congress intended to encourage and protect. Employees are unlikely to complain to their employers if they realize that any legal insufficiency in their claim of discrimination would mean that that complaint could lead to an entirely lawful retaliatory dismissal. The West Virginia Supreme Court, in applying to state anti-retaliation law the reasonable belief doctrine utilized by federal courts in section 704(a) cases, explained that the purposes of an anti-retaliation law

> would be wholly defeated if its protection applied only to those individuals who confidently know the technical area of fair employment law and who correctly predict how its doctrine will ultimately be applied in a court of law.

Hanlon v. Chambers, 195 W. Va. 99, 113, 464 S.E. 741, 755 (1995).

A narrow construction of the opposition clause in section 704(a) will force aggrieved employees to resort directly to the EEOC, forsaking utilization of less formal compliant or grievance procedures established by their own employers. Section 704(a) contains an absolute protection for employees who file charges with the EEOC or otherwise participate in an EEOC proceeding, regardless of the merit of those charges. "The remedial purposes of Title VII would be ill served by telling employees that they can be sure of protection only if they limit their complaints about discrimination to formal EEOC filings."

Parker v. Baltimore and Ohio R.R. Co., 652 F.2d 1012, 1019 (D.C. Cir. 1981).

Limiting section 704(a) to errors of fact would seriously interfere with important exchanges of views between employees and employers about employment practices such as affirmative action. A significant number of workers hold the view, shared by some members of this Court, that affirmative action (or certain forms thereof) constitute illegal discrimination under Title VII. In many instances, of course, the affirmative action to which workers may today object is clearly lawful under the majority opinions in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) and *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987). Since the legality of many types of affirmative action is now "settled law," employees in the Fifth Circuit, and elsewhere, could be dismissed for expressing to their employers the same objections to affirmative action that were articulated by several members of this very Court in *Weber* and *Johnson*.

III. THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR DETERMINING THE QUESTION PRESENTED

This case presents an appropriate vehicle for resolving the inter-circuit conflict regarding whether the protections of section 704(a) are lost, retroactively, if a court determines *after* the opposition activity has occurred that the practices to which the retaliation victim objected were lawful under Title VII. That is precisely what occurred in the instant case, in which the Fifth Circuit relied on a 2003 decision in *Ackel* (and arguably the 2002 decision in *Green*) to hold that Wilson could not reasonably have

believed at the time of his 2001 objection to paramour favoritism that such preferential action violated Title VII.

This case also provides an appropriate occasion to determine whether, as the Ninth Circuit holds, the reasonableness of an employee's belief that he or she is opposing unlawful discrimination should be evaluated in light of the limited knowledge of laymen, who will rarely, if ever, be familiar with judicial decisions interpreting Title VII. Regardless of what understanding of Title VII might be gleaned from a careful review (in 2001 or today) of reported and unreported appellate decisions regarding favoritism for a paramour, a layman (or indeed, a judge) familiar only with the fact that Title VII forbids discrimination "because of . . . sex" might reasonably conclude that such preferential treatment is unlawful. When this issue first arose, that was precisely the manner in which Title VII was construed by a number of judges,[13] including the Chief Judge of the Southern District of New York[14] and Judge Gessell of the District Court for the District of Columbia.[15] For a time the lower courts were evenly divided regarding whether Title VII forbad favoritism for a paramour. Then Judge Scalia (among others) insisted in *King v. Palmer*, 778 F.2d 878, 883 (D.C. Cir. 1985) (opinion regarding denial of rehearing en banc) that that was on open question of statutory interpretation. Legal scholars

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[13] In addition to the cases cited below, *see Kersul v. Skulls Angels, Inc.*, 130 Misc. 2d 345, 495 N.Y.S. 2d 886 (S.Ct. 1985).

[14] Chief Judge Brieant held, after a bench trial, that such favoritism violated Title VII. *DeCinto v. Westchester County Medical Center*, 807 F.2d 304, 304-07 (2d Cir. 1986).

[15] *King v. Palmer*, 598 F. Supp. 65 (D.D.C. 1984), *vacated on other grounds, King v. Palmer*, 778 F.2d 878 (D.C. Cir. 1985).

have been sharply divided about whether such favoritism violates Title VII.[16] If, as the Ninth Circuit holds, employees cannot be expected to have more than a common sense understanding of what constitutes gender-based discrimination, the fact that judges and scholars could disagree about the meaning of Title VII is entirely sufficient to demonstrate that an ordinary worker could reasonably believe that favoritism for a paramour constitutes unlawful discrimination, and to compel the conclusion that opposition to such preferences is protected by section 704(a).

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[16] Joan Von Toll, Eros Gone Awry: Liability Under Title VII for Workplace Sexual Favoritism, 13 Indust. Rel.L.J. 153, 167 (1991) (noting division among earlier judicial decisions); Robert Shearer, Paramour Claims Under Title VII: Liability for Co-Worker/Employer Sexual Relations, 15 Employee Rel.L.J. 57 (1989); Mary Manemann, The Meaning of "Sex" in Title VII: Is Favoring An Employee A Violation of the Act, 83 N.W.U.L.Rev. 612, 612 (1989) ("That simple prohibition has been interpreted to yield very different outcomes in a factual scenario involving a sex discrimination claim new to Title VII jurisprudence: the hired or promoted lover"); Michael J. Phillips, The Dubious Title VII Cause of Action for Sexual Favoritism, 51 Wash. & Lee L. Rev. 547, 549 (1994) ("A majority of the courts that have considered sexual favoritism claims have recognized the possibility of recovery for sexual favoritism under one theory or another."); Note, Sex, Promotions and Title VII: Why Sexual Favoritism Is Not Sexual Discrimination, 45 Hastings L.J. 667, 668-69 (1994) (noting that the law on this issue "is still very much uncertain").

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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WILLIAM HARRY WILSON,
Plaintiff-Appellant,
versus
DELTA STATE UNIVERSITY et al.,
Defendants-Appellees.
No. 04-60759 Summary Calendar

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

143 Fed. Appx. 611; 2005 U.S. App. LEXIS 16964

August 12, 2005, Filed

JUDGES: Before GARZA, BENAVIDES, and CLEMENT, Circuit Judges.

OPINION:

PER CURIAM:[1]

William Harry Wilson appeals the district court's ruling granting a motion for judgment as a matter of law ("JMOL") in favor of Delta State University and the individual defendants (collectively, "Delta State") in this employment discrimination action. Finding no error, we affirm.

I. FACTS AND PROCEEDINGS

Wilson was employed by Delta State University as director of its Audio-Visual Center from 1983 to 2001. On October 26, 2000, Dr. David Potter, the president of the University, appointed Dr. Michelle Roberts as Chief

[1] Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Information and Planning Officer ("CIPO"). Potter did not advertise the CIPO position before appointing Roberts, but Delta State claims that such advertising was not necessary under the University's policy because the appointment was an internal promotion. Roberts became Wilson's supervisor and the relationship between Roberts and Wilson quickly deteriorated. From mid-March to mid-April of 2001, Roberts prepared a plan to consolidate the Audio-Visual Center and Instructional Technology Center into a new Technology Learning Center. This plan would eliminate Wilson's position, but Roberts allegedly had no intention of hiring Wilson to be the director of the new center because of their problematic relationship.

On April 20, Wilson met with Potter to discuss his frustration regarding the changes in the audio-visual and technology departments. He told Potter that Roberts was not qualified for the CIPO position and that she only got the job because she was having an affair with Dr. Leroy Morganti, a University administrator.

On April 24, Roberts proposed her plan to the University. The University approved the plan, and Wilson's position was eliminated. On June 29, Potter informed Wilson that his position was being eliminated and that his contract would not be renewed.

On November 21, 2002, Wilson brought this action in the United States District Court for the Northern District of Mississippi, alleging that Delta State declined to renew his contract in retaliation for his complaints to Potter that Roberts was not qualified for the CIPO position and that she received the appointment because she was having an affair with Morganti. Wilson also brought a gender discrimination claim and a state breach of contract claim.

On July 23, 2004, the district court granted Delta State's motion for summary judgment on Wilson's gender discrimination claim and denied its motion for summary judgment on Wilson's retaliation and state breach of contract claims. Delta State made a motion to reconsider, and the district court determined that it did not have jurisdiction over the state law claims and accordingly dismissed those claims.

On August 2, a trial commenced on the retaliation claim. At the close of Wilson's case, Delta State moved for JMOL. The district court granted this motion and subsequently entered an order confirming its ruling, holding that Wilson had not made out a *prima facie* case of retaliation because he "did not engage in protected action in his conference with Dr. Potter," i.e., Wilson did not complain about an employment action which violated Title VII. The district court reasoned that Delta State's alleged preferential treatment of Roberts because she was having an affair with Morganti was not gender discrimination because "preferential treatment of a paramour, while obviously unfair, is not gender discrimination for the simple reason that such treatment discriminates not only against men but also against all other women in the world except the one paramour." Regarding Wilson's complaint that Delta State improperly failed to advertise the position, the court pointed to cases holding that the failure to advertise a position does not amount to gender discrimination.

Wilson timely appealed the district court's judgment and order granting the motion for JMOL on the retaliation claim.

II. STANDARD OF REVIEW

This Court reviews the district court's grant of JMOL *de novo*. *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 218-19 (5th Cir. 2001). JMOL shall be granted when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Id.* (quoting Fed. R. Civ. P. 50(a)). The record must reveal "more than a mere scintilla of evidence" for this Court to reverse the grant of JMOL. *Id.* at 219.

III. DISCUSSION

Where a plaintiff presents only circumstantial evidence of retaliation, as is the case here, the *McDonnell Douglas* framework guides our analysis. *Montemayor v. City of San Antonio*, 276 F.3d 687, 692 (5th Cir. 2001). Under *McDonnell Douglas*, Wilson must first establish a *prima facie* case of retaliation. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). To do so, he must demonstrate: (1) that he engaged in an activity protected by Title VII; (2) that he experienced an adverse employment action following the protected activity; and (3) a causal link existed between the protected activity and the adverse employment action. *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 519 (5th Cir. 2001).

An employee has engaged in protected Title VII activity if "he or she has (1) 'opposed any practice made an unlawful employment practice by this subchapter,' or (2) 'made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.'" *Byers v. Dallas Morning News, Inc.*, 209

F.3d 419, 427-28 (5th Cir. 2000) (emphasis omitted) (quoting 42 U.S.C. § 2000e-3(a)). The relevant clause is the opposition clause, because Wilson never participated in any formal Title VII proceedings, but merely complained to Potter. The opposition clause requires that the employee demonstrate that he or she had at least a "reasonable belief" that the opposed practice was unlawful. *Id.* at 428 (citing *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. Unit A Sept. 1981)).

Wilson argues that he reasonably believed that Roberts got her job because of the affair, and that this favoritism amounted to discrimination in violation of Title VII. He relies on *Payne*, in which this Court addressed the issue "whether proof of an actual unlawful employment practice is necessary under the opposition clause, or whether an employee is protected from retaliation under the opposition clause if the employee reasonably believes that the employer is engaged in unlawful employment practices." *Payne*, 654 F.2d at 1138. This Court decided the latter, holding that "a plaintiff can establish a *prima facie* case of retaliatory discharge under the opposition clause of section 704(a) if he shows that he had a reasonable belief that the employer was engaged in unlawful employment practices." *Id.* at 1140. Wilson's reliance on this holding, however, is misplaced.

Payne involved an employee who believed the employer was engaged in an actual unlawful practice, even while in fact, the employer may not have been so engaged. This Court held in *Payne* that it was not fatal to the plaintiff's retaliation case that he failed to prove that the employer was actually discriminating against blacks in retail store employment opportunities. *Id.* at 1137.

Payne does not involve an employee who believes that an employer is engaged in an unlawful practice although that practice is not actually unlawful, which is the situation here.[2] The practice of which Wilson complained, that Roberts was unqualified and was hired because of an affair, is not a practice made unlawful by Title VII. "'When an employer discriminates in favor of a paramour, such an action is not sex-based discrimination, as the favoritism, while unfair, disadvantages both sexes alike for reasons other than gender.'" *Ackel v. Nat'l Communications., Inc.*, 339 F.3d 376, 382 (5th Cir. 2003) (quoting *Green v. Adm'rs of the Tulane Educ. Fund*, 284 F.3d 642, 656 n.6 (5th Cir. 2002)). Whether Wilson believed to the contrary is immaterial. Even if his allegation that Roberts obtained the position because of her affair were [sic] correct, such "paramour favoritism" is not an unlawful employment practice under Title VII, because "the fact that [Wilson] may have been terminated for complaining about favorable treatment received by [Roberts] is unrelated to [Wilson's] gender." *Id.* Because it is settled law in this

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[2] *Payne* does discuss and rely upon such a case, but that case is distinguishable. 654 F.2d at 1138 (discussing *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041 (7th Cir. 1980)). In *Berg*, the plaintiff was discharged after opposing as gender-based discrimination her employer's failure to provide pregnancy benefits. After she was fired, the United States Supreme Court held that a disability plan does not violated [sic] Title VII because of its failure to cover pregnancy-related disabilities. *General Electric Co. v. Gilbert*, 429 U.S. 125, 50 L. Ed. 2d 343, 97 S. Ct. 401 (1976). The Seventh Circuit held that because the employee opposed a practice that she reasonably believed was unlawful under Title VII, her opposition was protected from retaliatory discharge, even though the practice was later determined not to be an unlawful practice. *Berg* is distinguishable from the present case, however, because the pregnancy issue was an unsettled question of law before the *General Electric* decision, and the plaintiff's belief that the practice violated Title VII was therefore reasonable.

Circuit that such paramour favoritism does not run afoul of Title VII, *id.*, Wilson's alleged belief to the contrary could not have been reasonable.

Because we agree with the district court and hold that Wilson has not satisfied the first prong of a *prima facie* case of retaliation, that he engaged in a activity protected by Title VII, we need go no further in our analysis.[3]

IV. CONCLUSION

Wilson failed to establish a *prima facie* case of retaliation; the decision of the district court granting Delta State's motion for JMOL is therefore AFFIRMED.

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[3] Wilson argues that the district court erred in its holding that failure to advertise a position does not amount to gender discrimination by relying on cases that have been overturned by *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000) (holding that "the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose"). We need not reach Wilson's argument because *Reeves* applies to whether a defendant's proffered explanation for an employment action is pretextual. *Id.* at 142-43 (explaining that after a plaintiff has established a *prima facie* case of discrimination, the burden of production shifts to the employer to articulate a non-discriminatory reason, and the plaintiff then bears the burden of persuasion to show that the proffered explanation is pretextual). Because Wilson has failed to establish a *prima facie* case, we need not address whether Delta State's explanation for appointing Roberts without advertising was a pretext for discrimination.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

WILLIAM HARRY WILSON PLAINTIFF

V. CIVIL ACTION NO. 2:02CV269-B-D

DELTA STATE UNIVERSITY, ET AL. DEFENDANTS

ORDER GRANTING JUDGMENT AS A MATTER OF LAW

(Filed Aug. 24, 2004)

The court has read the testimony of the plaintiff, has reread the cases that were cited by counsel for both sides, and is ready to rule on the motion of the defendants for judgment as a matter of law.

To make out a prima facie case of retaliation, the plaintiff must have complained to the defendant about an employment action of the defendant which violated Title VII. The plaintiff must have suffered an adverse employment action because of his complaint.

In this case, in rereading the testimony of the plaintiff, the court finds the plaintiff complained to President Potter that Dr. Roberts was not competent at her job and that the job opening was not advertised. The plaintiff asked Dr. Potter whether Dr. Roberts got the job because of her affair with the man who recommended her for the job. The question is: Is this complaint of the plaintiff protected action under Title VII? In ruling on this motion, the court must take all matters to which the plaintiff testified as true and in the light most favorable to the plaintiff.

The plaintiff testified in the first part of his testimony that he went to see Dr. Potter not to complain in regard to Dr. Roberts but to talk to him about the Audio-Visual Center and the problems that the center had encountered. As he said, this was his one chance to talk to President Potter whom he had previously not met. The plaintiff testified he was somewhat put out because Dr. Potter did not listen to him as closely as the plaintiff thought he should. The plaintiff said that Dr. Potter's eyes glazed over and that he stared out the window and at one time even talked on the phone to someone while the plaintiff was in his office hoping to talk to him. The plaintiff then became frustrated and, as he said, became angry and told Dr. Potter that Dr. Roberts was not competent and that he wondered if she got her job because of her alleged affair.

The court is making no judgment on this alleged affair and is making no judgment on whether the position should or should not have been advertised. The plaintiff argues that it should have been advertised. Dr. Potter and another administrator testified that it should not. The court does not have to make a judgment on this issue. The court finds that the matter is a question of fact, and the court is considering at this time that the position should have been advertised.

Assuming the foregoing, the court is of the opinion that the plaintiff did not engage in protected action in his conference with Dr. Potter. He did not go into the conference to complain about a gender discrimination problem and, in fact, did not complain about gender discrimination under Title VII. Preferential treatment of a paramour, while obviously unfair, is not gender discrimination for the simple reason that such treatment discriminates not only against men but also against all other women in the world

except the one paramour. *Ackel v. Nat'l Communications, Inc.*, 339 F.3d 376, 382 (5th Cir. 2003) (citing *Green v. Administrators of the Tulane Educational Fund*, 284 F.3d 642, 656 n.6 (5th Cir. 2002).

The plaintiff's other complaint is that the position was not advertised. The defendants have cited a line of cases in which courts have declined to find that the failure to advertise a position amounted to gender discrimination. *See, e.g., Aldridge v. Tougaloo Coll.*, 847 F. Supp. 480, 484-85 (S.D. Miss. 1994); *Jackson v. City of Chicago*, No. 96 C 3636, 1996 WL 734701, at *1, n.3 (N.D. Ill. Dec. 18, 1996).

The court does not believe that Dr. Wilson ever really felt that he had been discriminated against because of gender. He testified that when Dr. Roberts got the job he was overjoyed and that he was happy to be out from under the "devil of the librarian." He was happy about Roberts' appointment until he had these disagreements with her and became angry and discouraged regarding her direction of the Audio-Visual Center.

The court also addresses the second reason that was raised, that is, whether a causal connection existed between the conference with Dr. Potter and the termination of the plaintiff. The testimony is uncontradicted that Dr. Roberts had agreed to merge the two departments and eliminate Dr. Wilson's job title before Dr. Wilson had the conference with Dr. Potter. Since Dr. Wilson did not engage in protected action, this matter is irrelevant; but even if the conversation had been protected action, the defendants have shown that the decision to merge the two departments had been made prior to the conference.

For the foregoing reasons, the court finds that the defendants' motion for judgment as a matter of law is well-taken and should be granted. It is, therefore,

ORDERED AND ADJUDGED that the defendants' motion for Judgment as a matter of law is **GRANTED.**

This, the 23 day of August, 2004.

/s/ Neal Biggers
NEAL B BIGGERS, JR.
SENIOR U.S.
DISTRICT JUDGE

Supreme Court, U.S.
FILED
JAN 17 2006
OFFICE OF THE CLERK

No. 05-610

In The Supreme Court of the United States

WILLIAM HARRY WILSON,

Petitioner,

vs.

DELTA STATE UNIVERSITY, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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INTRODUCTION AND QUESTIONS PRESENTED

During a meeting in April 2001, Petitioner William Harry Wilson, Director of Audio Visual Center at Delta State University, complained to President David Potter about a number of frustrations with his job. Sensing that President Potter was not concerned about his issues, Wilson, in a moment of anger, alleged that his immediate supervisor had received her position because of an affair she was having with a University vice-president. A few days later, the President's Cabinet approved a long-planned internal reorganization that eliminated Wilson's position and ultimately ended his employment with the University.

Wilson sued. The district court granted the University judgment as a matter of law after determining that Wilson did not engage in Title VII protected activity in his conference with President Potter and that Wilson failed to establish a causal connection between his conversation with President Potter and the decision to eliminate Wilson's position. The Court of Appeals for the Fifth Circuit affirmed on the questions presented to it, holding that the practice of which Wilson complained (that Roberts was hired because of an affair) is not a practice made unlawful by Title VII and, therefore, Wilson did not engage in statutorily protected conduct.

Wilson now distances himself from the issues argued below and presents the following questions to this Court:

> (1) Does section 704(a) of Title VII of the Civil Rights Act of 1964 protect an employee who mistakenly believed the practices he or she opposed

QUESTIONS PRESENTED – Continued

were unlawful if that mistake was based on an error of law?

(2) Does an individual who opposed practices he or she believed were unlawful under Title VII lose the protections of section 704(a) retroactively if the court of appeals holds, after the individual objected to those practices, that the practices in question did not violate Title VII?

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STATEMENT OF THE CASE

William Harry Wilson ("Wilson") sued his former employer Delta State University and related University officials claiming the University discriminated against him because of his gender by promoting Dr. Michelle Roberts ("Dr. Roberts"), a female, to the position of Chief Information and Planning Officer ("CIPO") instead of him. He also claimed the University later declined to renew his contract of employment in retaliation for his complaining on April 20, 2001, to then-President David Potter that Dr. Roberts was appointed to the CIPO position only because of a romantic relationship she was having with a high-level University administrator.

The district court granted the University summary judgment on Wilson's gender discrimination claim, finding the claim was time-barred. Trial commenced on August 2, 2004, on the retaliation claim. At the close of Wilson's case, the University moved for judgment as a matter of law, arguing that: (i) Wilson's complaint to then President Potter that Dr. Roberts received the CIPO position only because of an alleged relationship with a University vice-president was not statutorily protected activity under the retaliation provision of Title VII, and (ii) Wilson failed to establish a causal connection between his complaint to President Potter and the University's merging of two departments that resulted in the elimination of his position. The district court ruled from the bench in the University's favor and entered a Final Judgment and Order granting the University's motion on August 6, 2004. On August 24, the district court entered an Order and Opinion confirming his earlier ruling that Wilson had not engaged in protected activity in his conversation with President Potter and that there was not a causal connection between

the decision to eliminate Wilson's position and the April 20 conversation between Wilson and President Potter. Wilson appealed.

CLARIFICATION OF THE FACTS

Because the facts of this case make it an inappropriate vehicle for the Court to address the Questions Presented, the University presents the facts in more detail than does Petitioner and corrects certain statements in the Petition.

A. Appointment of Dr. Roberts to CIPO Position and Her Relationship with Wilson

Wilson was Director of the Audio-Visual Center at the University from 1983 to June 30, 2001. For many years, he reported to the Director of the Library. In October 2000, as part of an administrative reorganization, President Potter appointed Dr. Roberts to the CIPO position and moved Wilson under her supervisor.

The working relationship between Dr. Roberts and Wilson began cordially. Wilson said he was "thrilled to be out of the library"; happy to be out from under the "devil of the librarian"; felt he had been "liberated"; and would have "rehung the moon for her [Dr. Roberts]."

The relationship, however, deteriorated rapidly. On March 8, 2001, Dr. Roberts and Wilson had a particularly unpleasant meeting during which they discussed problems Wilson had with an audit of his equipment by the State Auditor and his threat to castrate another employee. Dr.

Roberts told Wilson that he had to come on board, cooperate with her, and assist her in developing a plan to move the University forward technologically. Wilson became visibly angry with Dr. Roberts, left the office, and slammed the door. At this point, Dr. Roberts decided that she could not work constructively with Wilson and would turn to Vicki Bond, Coordinator of Instructional Technology, and give her the opportunity that she had given Wilson, *i.e.*, to assist in moving the University forward on technology issues.

B. Development of Plan That Eliminated Wilson's Position

On March 9, 2001, Dr. Roberts met with Ms. Bond and asked her to prepare a plan to develop a stronger instructional technology program for the University. On March 27, Ms. Bond presented Dr. Roberts a plan for the merger of the Audio-Visual and Instructional Technology areas. Dr. Roberts used Ms. Bonds' suggestions in preparing her formal recommendation to the President's Cabinet for the merger of Audio-Visual (Wilson's department) and Instructional Technology (Ms. Bond's department), the elimination of Wilson's position, and the creation of a new unit – the Technology Learning Center (the "TLC").

During this same mid-March to mid-April 2001 time period, Dr. Roberts considered who she would want to lead the new TLC if the Cabinet accepted her recommendation that this new unit be created from a merger of Audio-Visual and Instructional Technology. After the March 8, 2001, meeting with Wilson, she knew she did not want him to be the director of the new Center. She observed Vicki Bond to be energetic, to be committed to moving the

University forward technologically, and to have an interest in leading the TLC. She decided to offer Ms. Bonds the leadership position if the Cabinet approved the merger.

Between April 4 and April 24, 2001, Dr. Roberts revised various drafts of her plan for the new Center. On April 24, 2001, Dr. Roberts presented her final reorganization plan to the Cabinet, which approved the combination of Audio-Visual and Instructional Technology that ultimately resulted in the elimination of Wilson's position.

C. Wilson's Complaints to President Potter on April 20, 2001

On April 20, 2001, Wilson went to President Potter's office to discuss the history of the Audio-Visual unit at the University and problems he was experiencing in his job. Wilson expressed his frustration at being left out of the new library building and being left out of discussions about the administrative reorganization in the Fall of 2000. He complained that the CIPO position was not advertised. He criticized Dr. Roberts' ability to do her job and to understand technology. Then Wilson became frustrated, got mad, and "said some things he should not have said", such as:

> Q: You said that Dr. Roberts, who was your supervisor at the time, was not qualified for the position and you had to conclude that she got the job because she was having a romantic relationship with her – at that time, her boss, Dr. Morganti?
>
> A: Yes.

The meeting ended shortly after this comment. Wilson provided no information that such a relationship actually

existed. He had testified that he had no proof of a relationship. As he put it, his information was all "just rumor and hearsay."

Following the Cabinet vote on April 24, President Potter notified Wilson that his position was being eliminated and that his contract with the University would not be renewed. Evidence at trial was uncontradicted that Dr. Roberts had decided to merge the two departments and eliminate Wilson's position before he had the April 20, 2001, conference with President Potter. Therefore, the district court found no causal connection between Wilson's complaints to President Potter and the elimination of his position.

REASONS FOR DENYING THE PETITION

I. The Questions Presented Were Not Presented to the Court Below.

In his Petition for Writ of Certiorari, Wilson presents his questions as follows:

> (1) Does section 704(a) protect an employee who reasonably but mistakenly believed the practices he or she opposed were unlawful if that mistake was based on an error of law?
>
> (2) Does an individual who opposed practices he or she believed were unlawful under Title VII lose the protections of section 704(a) retroactively if the court of appeals holds, *after* the individual objected to those practices, that the practices in question did not violate Title VII?

Wilson presented neither of these issues to the Fifth Circuit Court of Appeals, nor did the Fifth Circuit or the district court, *sua sponte*, rule upon them. This Court should reject the Petition for this threshold failure by Wilson to give the Fifth Circuit a fair opportunity to consider the issues of law that he now so strenuously asserts.

In his appeal to the Fifth Circuit, the issue that most closely parallels the one Wilson now champions, was stated as follows: "Whether the United States District Court's factual finding that the plaintiff did not believe he had been discriminated against even though he complained of such discrimination is supported by the record and sufficient to take the case away from the jury and grant a Judgment as a matter of law." The issue, Wilson argued, was his *belief that the wrongful conduct had occurred*, not whether a belief that something was illegal (when, in fact, it was not) could support an opposition clause claim.

In support of this issue, Wilson relied almost entirely upon the 1981 case of *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. 1981), a case which stands for the fairly mundane proposition that "an employee who engages in opposition activity should not be required to act at his own peril if it turns out that no unlawful *employment activity* actually exists, as long as the employee holds a reasonable belief that the unlawful *employment practices* do exist." *Payne*, 654 F.2d at 1139 (emphasis added). The Fifth Circuit carefully considered Wilson's argument, as had the district court before it, and distinguished *Payne*, and its application to Wilson's appeal.

> *Payne* involved an employee who believed the employer was engaged in an actual unlawful practice, even while in fact, the employer may not have been so engaged. This Court held in *Payne* that it was not fatal to the plaintiff's retaliation case that he failed to prove that the employer was actually discriminating against blacks in retail store employment opportunities. *Id.* at 1137.
>
> *Payne* does not involve an employee who believes that an employer is engaged in an unlawful practice although that practice is not actually unlawful, ***which is the situation here. The practice of which Wilson complained, that Roberts was unqualified and was hired because of an affair, is not a practice made unlawful by Title VII.*** (Emphasis added.)

Fifth Circuit Opinion at 6a, Appx. to Wilson's Petition.

The Fifth Circuit continued by addressing precisely the issue Wilson had raised, and responding to his assertion that the jury should have played a role in the trial:

> Whether Wilson believed to the contrary [that is, that paramour favoritism, standing alone, somehow constituted sex discrimination] is immaterial. Even if his allegation that Roberts obtained the position because of her affair were [sic] correct, such 'paramour favoritism' is not an unlawful employment practice under Title VII, because 'the fact that [Wilson] may have been terminated for complaining about favorable treatment received by [Roberts] is unrelated to [Wilson's] gender'. [internal citation omitted.] Because it is settled law in this Circuit that such paramour favoritism does not run afoul of Title VII, Wilson's alleged

> belief to the contrary could not have been reasonable.

Id. at 6a-7a.

Wilson now seeks to involve this Court by arguing issues never raised below, never considered, and never addressed by the Fifth Circuit. He leaves the *Payne* analysis, and defaults to an argument of timing, asking this Court to grant certiorari based on faulty assumptions of unsettled law – but assumptions that were not, in any case, ever presented to the courts below for consideration.

Although parties are not limited to the precise arguments made below, *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992), this Court has also indicated that it would only hear those "new" issues when it believed that the Circuit below "understood the tenor of the argument." *Harris Trust & Savings Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 245 n.2 (2000). *See also Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) ("Although defendant's petition for certiorari presented the question[, it] was not raised in the Court of Appeals and is not properly before us."). It cannot be said that the Fifth Circuit understood the tenor of Wilson's argument now presented to this Court. It simply was not made.

II. The Law Was Settled by 2001 That Paramour Favoritism Does Not Violate Title VII.

For the first time, Wilson contends that the lower courts stripped him of protection to which he otherwise was entitled under section 704(a) upon a showing that he reasonably believed paramour favoritism was unlawful under Title VII. He now argues that the law as to paramour favoritism was unsettled prior to the 2003 decision

in *Ackel v. Nat'l Communications, Inc.*, 339 F.3d 376 (5th Cir. 2003) or the 2002 decision in *Green v. Adm'rs of the Tulane Educ. Fund*, 284 F.3d 642, 656 n.6 (5th Cir. 2002), and that, therefore, he reasonably could have believed that such favoritism was unlawful. Thus, he contends, his alleged opposition in 2001 should be protected under section 704(a). Aside from Wilson's failure to properly present this argument below, the argument lacks merit, as the "debate" surrounding paramour favoritism was settled by 2001.

First, there is an important difference between paramour favoritism and sexual harassment that *includes* paramour favoritism. Wilson never alleged that he or any other employee was subjected to a hostile work environment or that some other employee demanded sexual favors as a *quid pro quo* from any subordinate employee, to Wilson's detriment. The proposition that *preferential treatment of a paramour without other indicators of actionable harassment does not constitute sexual discrimination* was not novel when Wilson met with President Potter in 2001. *See* Michael J. Phillips, *The Dubious Title VII Cause of Action for Sexual Favoritism*, 51 Wash. & Lee L. Rev. 547, 559 (1994) ("[A]lmost all courts considering the sexual favoritism issue have . . . reject[ed] the idea that Title VII forbids sexual favoritism as such.").

More to the point of Wilson's newfound argument, over a decade before, in 1990, the EEOC, under the direction of then-Chairman Clarence Thomas, adopted the view set forth by the Second Circuit in *DeCintio v. Westchester County*

Medical Center, 807 F.2d 304, 308 (2d Cir. 1986), *cert. denied*, 484 U.S. 825 (1987)[1] that not all types of sexual favoritism violate Title VII, and issued a policy guidance stating that paramour favoritism, in the absence of other factors establishing the existence of sexual harassment, did not violate Title VII. Policy Guidance on Employer Liability under Title VII for Sexual Favoritism, No. 915.048, 1990 WL 1104702 (January 12, 1990). The EEOC reasoned that neither a male nor a female employee could show that he or she had been treated less favorably than another employee of the opposite sex based solely on the fact that a supervisor treated a paramour more favorably. *Id.* The EEOC acknowledged that situations involving sexual relationships between employees and supervisors *could* give rise to Title VII liability if the sexual relationship were coerced or necessary for a member of a particular sex to obtain an employment benefit. *Id.* at *2. The EEOC further stated that widespread favoritism based on granting of sexual favors also might be tantamount to a hostile work environment. *Id.* at *3 ("In these circumstances, a message is implicitly conveyed that managers view women as 'sexual playthings,' thereby creating an atmosphere that is demeaning to women."). Petitioner, however, alleged neither of the latter two potential violations in his meeting with President Potter.

Since 1990 (but before 2001), most, if not all, lower courts considering the issue have followed *DeCintio* and the EEOC Policy Guidance. *See, e.g.*, *Womack v. Runyon*, 147 F.3d 1298, 1300 (11th Cir. 1998); *Taken v. Oklahoma Corp. Comm'n*, 125 F.3d 1366, 1369-70 (10th Cir. 1997);

---

[1] Wilson failed to point out that the Second Circuit in *DeCintio* overruled the district court opinion upon which he relies in his Petition.

Becerra v. Dalton, 94 F.3d 145, 150 (4th Cir. 1996); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1353-54 (7th Cir. 1995); *Piech v. Arthur Anderson & Co, S.C.*, 841 F. Supp. 825, 829-30 (N.D. Ill. 1994); *Thomson v. Olson*, 866 F. Supp. 1267, 1272 (D.N.D. 1994), *aff'd*, 56 F.3d 69 (8th Cir. 1995); *Candelore v. Clark County Sanitation Dist.*, 752 F. Supp. 956, 960-61 (D. Nev. 1990), *aff'd*, 975 F.2d 588 (9th Cir. 1992) (rejecting claims based on both Title VII and the ADEA). The state of the law with regard to paramour favoritism is – and was in 2001 – firmly settled.

In fact, even the Fifth Circuit's rejection of paramour favoritism claims did not begin with *Ackel* or *Green*, as Wilson implies. In 1995, the Fifth Circuit discussed the issue for the first time in *Ellert v. University of Texas, at Dallas*, 52 F.3d 543 (5th Cir. 1995). In *Ellert*, a female employee entered the office of her supervisor and saw the supervisor embracing another female employee. *Id.* at 544. After plaintiff was terminated, she alleged that her termination was "solely because of her discovery of the indiscretion." *Id.* The court cited section 1604.11(g), *DeCintio*, and *Candelore* in noting that claims related to a supervisor's voluntary sexual relationship with a subordinate had "not been widely accepted." *Id.* at 546. The court affirmed the grant of summary judgment to the defendant, holding that "[e]ven if [the plaintiff's] knowledge of the affair was the true *animus* behind the discharge decision, it was a motivation that did not rely upon her gender and, as such, it was not within the ambit of Title VII's protections." *Id.* (emphasis in original).

Before *Ackel* and *Green*, courts frequently cited *Ellert* in concluding that paramour favoritism was not a form of discrimination prohibited under Title VII. *See Taken*, 125

F.3d at 1370; *Buenrostro v. Flight Safety Intern., Inc.*, No. CIV.A.SA-99-CA0819FB, 2001 WL 674171, at *6 (W.D. Tex. March 2, 2001), *aff'd in part*, 62 Fed. Appx. 556, 2003 WL 1202768 (5th Cir. (Tex.)), Feb. 25, 2003; *Lopez v. Four Seasons Nursing Ctrs., Inc.*, No. CIV.A.SA-99CA07690G, 2000 WL 33348796, at *10 (W.D. Tex. December 13, 2000); *Harvey v. Chevron U.S.A., Inc.*, 961 F. Supp. 1017, 1029 (S.D. Tex. 1997); *Boyd v. Runyon*, No. 94-1557-JTM, 1996 WL 294330, at *3 (D. Kan. May 23, 1996); *Proksel v. Gattis*, 49 Cal. Rptr. 2d 322, 324 (Cal. Ct. App. 1996). It can hardly be said, then, that *Ackel*, or even *Green*, was the genesis of the law on paramour favoritism in the Fifth Circuit.

III. This Case Is Not an Appropriate Vehicle for Addressing the Questions Presented.

Wilson asserts that his case presents an appropriate vehicle for resolution of issues he presents. However, even if this Court were to hear the merits of this case, rule in Wilson's favor, and remand the case for further proceedings, there is no record evidence upon which the lower courts could determine that Wilson reasonably believed the content of his conversation with President Potter was protected activity under section 704(a). Furthermore, by Wilson's own admission, the impulsive and unfounded accusations he claims caused the elimination of his position are not the sort of important exchanges of views between employees and employers he now claims are at stake in this case. Finally, as determined by the trial court, the decision to eliminate Wilson's position was far down the track before Wilson ever stepped into President Potter's office. Therefore, even if this Court finds merit in

the issues presented in the Petition, this case is not an appropriate vehicle through which to consider them.

As Wilson points out, an employee is entitled to protection under section 704(a) for opposition activity based on a reasonable belief that the employer is engaged in unlawful employment practices. *See, e.g., Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981). Wilson argues that he believed he was complaining about perceived sex discrimination. However, his testimony at trial establishes that his comments to President Potter about an alleged relationship between Drs. Roberts and Morganti did *not* amount to opposition of practices he perceived to be discriminatory.

There is nothing in the record to support Wilson's assertion that he "reasonably believed" Dr. Roberts obtained the CIPO position because of an alleged affair she was having with Dr. Morganti. Wilson himself acknowledged that he had no proof that Dr. Roberts was having an affair with Dr. Morganti. He said: "It's all hearsay, it's all rumor, but she was." Later when asked what proof he had that they [Drs. Roberts and Morganti] were having an affair, he replied, "None." Surely such testimony based on rank rumor and gossip does not provide the proper foundation for Wilson to claim that he "reasonably believed" the University's selection of Dr. Roberts for the CIPO position was a violation of Title VII and that his complaints to President Potter were protected activity.

Wilson never intended to complain about sex discrimination, nor did he think that he was complaining about sex discrimination. Wilson admits he did not contest

the process through which Dr. Roberts was promoted to the CIPO position. Trial Transcript, at 60 (Wilson). He never told President Potter that he considered himself more qualified for Dr. Roberts' position or that he had even been interested in becoming the CIPO himself. *Id.* at 60-61. He presented no evidence to President Potter of the alleged affair or of any resulting discrimination. Rather, he admits that he became frustrated when the meeting did not go as he wanted and, in anger, accused two high-ranking university officials of an inappropriate sexual relationship. President Potter could not have understood such a complaint as anything more than a personal grievance – *not* as a complaint about alleged sex discrimination. *Id.* at 38 (Wilson). *See Alack v. Beau Rivage Resorts, Inc.*, 286 F. Supp. 2d 771, 775 (S.D. Miss. 2003) ("[T]he 'wide range' of protected activity [under the opposition clause] does not include those situations where the opposition relates not to unlawful employment practices but to a personal grievance.") (quoting *Garcia-Paz v. Swift Textiles, Inc.*, 873 F. Supp. 547, 559 (D. Kan. 1995)). While an employee is not required to register opposition to allegedly unlawful practices with "the clarity or precision of lawyers," an employee's statement must be clear enough for an employer to discern that the employee opposes an allegedly unlawful employment practice. *Alack*, 286 F. Supp. 2d at 774-75. Wilson's outburst plainly failed to meet this minimum threshold of clarity.

Even if this Court should determine that Wilson's complaints to President Potter rise to the level of protected opposition activity and remand this case, his retaliation claim will still fail for lack of a causal connection between his complaints and the elimination of his position. The

district court made this finding in its Order Granting Judgment as a Matter of Law:

> The testimony is uncontradicted that Dr. Roberts had agreed to merge the two departments and eliminate Dr. Wilson's job title before Dr. Wilson had the conference with Dr. Potter. Since Dr. Wilson did not engage in protected activity, this matter is irrelevant; but even if the conversation had been protected action, the defendants have shown that the decision to merge the two departments had been made prior to the conference.

Order Granting Judgment as Matter of Law at 10a, Appx. to Wilson's Petition.

This case is not an appropriate vehicle through which this Court should consider the Questions Presented.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Certiorari.

THIS, the 17th day of January, 2006.

Respectfully submitted,

DELTA STATE UNIVERSITY, ET AL.

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(3)

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In The
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WILLIAM HARRY WILSON,

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v.

DELTA STATE UNIVERSITY, *et al.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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ARGUMENT

THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR DECIDING THE QUESTIONS PRESENTED

Respondents do not dispute the existence or importance of the inter-circuit conflict described in the Petition. They argue only that the instant case is not an appropriate vehicle for resolving the Questions Presented. Respondents' arguments are unsound, and in certain respects rest on an incorrect characterization of the proceedings below.

Respondents incorrectly assert that the only relevant issue raised by petitioner in the Fifth Circuit was whether petitioner *in fact* believed he had been discriminated against.[1] To the contrary, petitioner expressly raised below the very issue underlying the petition, whether as a matter of law Title VII protects from retaliation an employee who reasonably but mistakenly believes that the actions he or she opposes constitute unlawful discrimination.

In his brief in the court of appeals, petitioner asserted that the district court erred in "finding as a matter of law [that] Dr. Wilson was not protected from retaliation

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[1] Br. Opp. 6:

> In his appeal to the Fifth Circuit, the issue that most closely parallels the one Wilson now champions, was stated as follows: "Whether the United States District Court's factual finding that the plaintiff did not believe he had been discriminated against even though he complained of such discrimination is supported by the record and sufficient to take the case away from the jury and grant a Judgment as a matter of law."

because he reported 'paramour' not sex discrimination.'"[2] The argument advanced by petitioner below is the same as the contention raised by the petition, that "Dr. Wilson's good faith belief that he had been discriminated against because of sex will sustain his retaliation claim, regardless of any paramour argument."[3] "An employee who engages in opposition activity should not be required to act a[t] his own peril if it turns out that no unlawful activity actually exists, so long as the employee holds a reasonable belief that the unlawful employment practices do exist."[4]

The district court had held that petitioner's actions were not protected from retaliation because there was no "gender discrimination for the simple reason that such treatment discriminates not only against men but also against all other women." (Pet. App. 9a).[5] That holding, petitioner argued in the court of appeals, was inconsistent with Eleventh Circuit precedent under which a plaintiff alleging retaliation did not have to demonstrate that unlawful discrimination had actually occurred; all that was required was a showing that the plaintiff had a "reasonable belief" that the employer had engaged in unlawful discrimination.[6] Petitioner invoked the leading Fifth Circuit case adopting the reasonable belief rule,

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[2] Brief for Appellant, p. 17.

[3] Brief for Appellant, p. 18.

[4] Brief for Appellant, pp. 18-19 (*quoting Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1139 (5th Cir. 1981)).

[5] Respondents suggests that the district court "distinguished *Payne*." (Br. Opp. 6). To the contrary, the district court made no mention of *Payne* and made no mention of the reasonable belief rule.

[6] Brief for Appellant, pp. 17-21.

Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130 (5th Cir. 1981).

Prior Fifth Circuit decisions applying the reasonable belief rule had not recognized an exception for cases in which the retaliation victim had made an error of law (the actions complained of were not unlawful) as opposed to an error of fact (the actions complained of had not occurred.)[7] That particular question had not been specifically addressed by the Fifth Circuit prior to the instant case. Petitioner urged the Fifth Circuit to apply the reasonable belief rule to errors of law, but the Fifth Circuit refused. Respondents are correct when they state that "[t]he Fifth Circuit carefully considered Wilson's [reliance on *Payne*] and distinguished *Payne*."[8] That disputed holding is precisely the basis of the questions presented.

Respondents incorrectly assert that in the court of appeals petitioner conceded that the favoritism he complained of was legal under Title VII, and that petitioner never contended that "he reasonably could have believed that such favoritism was unlawful."[9] To the contrary, in

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[7] The Fifth Circuit in the years following *Payne* had repeatedly held that employees are protected from retaliation when they complained with a "reasonable belief" that there had been a violation of Title VII, even though that belief may have been mistaken. *Thibodeau v. CLECO Utility Group*, 68 Fed. Appx. 711, 714 (5th Cir. 2004); *Green v. Administrators of Tulane Educational Fund*, 284 F.3d 642, 657 (5th Cir. 2002); *Cartagena v. Aegis Mortgage Corp.*, 275 F.3d 346 (4th Cir. 2001); *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000); *Randel v. U.S. Dept. of Navy*, 157 F.3d 392, 394 (5th Cir. 1998); *Long v. Eastfield College*, 88 F.3d 300, 305 (5th Cir. 1996); *DeAnda v. St. Joseph Hospital*, 671 F.2d 850, 853 n.2 (5th Cir. 1982).

[8] Br. Opp. 6.

[9] Br. Opp. 8-9.

the Fifth Circuit petitioner argued expressly that under the circumstances of this case paramour favoritism was indeed *un*lawful under Title VII.

> In those cases in which Title VII was extended to allow recovery based upon a supervisor's voluntary sexual relationship with a subordinate, the claims usually were premised upon the paramour receiving some form of preferential treatment over the claimant. See *King v. Palmer*, . . . 778 F.2d 878 (D.C.Cir. 1985) (implicit recognition of Title VII action alleging discrimination due to favored treatment of paramour); *Toscano v. Nimmo*, 570 F.Supp. 1197 (D.Del. 1983) (supervisor's grant of promotion to lover over plaintiff sufficient to predicate liability under Title VII).[10]

In its 2005 decision in the instant case the Fifth Circuit held that this issue had been resolved to the contrary in its 2003 decision in *Ackel v. Nat'l Communications, Inc.*, 339 F.3d 376 (5th Cir. 2003), and its 2002 decision in *Green v. Administrators of the Tulane Educ. Fund*, 284 F.3d 642 (5th Cir. 2002); but the court below did not even suggest that the Fifth Circuit had yet addressed this issue in 2001, when petitioner complained to his employer and was dismissed.

Respondents note that in 1995 the Fifth Circuit had referred to the problem of paramours in *Ellert v. University of Texas*, 52 F.3d 543 (5th Cir. 1995),[11] a decision never mentioned by the court of appeals. Respondents observe that some lower courts (but not the Fifth Circuit) had "cited *Ellert*" in holding that paramour favoritism was

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[10] Brief for Appellant, pp. 20-21.

[11] Br. Opp. 11.

lawful.[12] But respondents do not contend in this Court that *Ellert* had decided in 1995 that paramour favoritism was legal under Title VII, and they advanced no such argument in the courts below.[13]

Respondents now suggest that by 2001 the legality of paramour favoritism had been resolved by decisions *outside* the Fifth Circuit.[14] But in the proceedings below respondents never contended,[15] and the Fifth Circuit clearly did not hold, that the reasonableness of petitioner's complaint would be controlled by non-Fifth Circuit precedent. The existence of a 1990 EEOC Policy Guidance – also cited by respondents for the first time in this Court

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[12] Br. Opp. 11. To the contrary, in one of the cases referred to by respondents, *Ellert* is actually described as holding that paramour favoritism *is* unlawful under Title VII. *Boyd v. Runyon*, 1996 WL 294330 *3 (D.Kan. 1996).

[13] The actual issue in *Ellert* was only whether Title VII protected a worker from dismissal because she had *knowledge* of (but had never objected to) a supervisor's affair. 52 F.3d at 546-47. *Ellert* expressly noted that there was legal authority for the proposition that favoritism for a paramour (as opposed to merely having a paramour) violates Title VII. 52 F.3d at 546:

> In those cases in which Title VII was extended to allow recovery based upon a supervisor's voluntary sexual relationship with a subordinate, the claims usually were premised upon the paramour receiving some form of preferential treatment over the claimant. In the instant case, however, Ellert does not allege that the assistant received preferential treatment over her because of the existence of a sexual relationship with the Dean.

(Footnote omitted). The footnote cited *King v. Palmer* and *Toscano v. Nimmo*, 52 F.3d at 546 n.12, the very cases relied on by petitioner in the court below in the instant case.

[14] Br. Opp. 9-11.

[15] In their brief in the Fifth Circuit, respondents did not rely on any of the eight non-Fifth Circuit cases now cited in their Brief in Opposition.

– assuredly did not conclusively establish the meaning of Title VII in the Fifth Circuit, any more than it does in this Court. *See, e.g., EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-69 (1991) (rejecting interpretation of Title VII in EEOC Policy Guidance).

The decision of the Fifth Circuit below rests solely on the questions of law set forth in the Questions Presented. Respondents argue that this case is not an appropriate vehicle for deciding those issues because, even if petitioner prevails on those legal issues, respondents on remand may later prevail at trial.[10] At this point in the proceedings, however, the only issue decided by the court of appeals, and before this Court, is whether the allegations of the petitioner – if true – are actionable as a matter of law. Respondents' predictions regarding the ultimate resolution of the factual disputes in this case are not relevant at this juncture. Whatever argument respondents wish to advance regarding the evidence offered by respondents and petitioner is a matter to be dealt with only on remand.

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[10] Br. Opp. 12:

> [E]ven if this Court were to hear the merits of this case, rule in Wilson's favor, and *remand* the case for further proceedings, there is no record evidence upon which the lower courts could [then] determine that Wilson reasonably believed the content of his conversation . . . was protected activity.

(Emphasis added). Br. Opp. 14:

> Even if this Court should determine that Wilson's complaints . . . rise to the level of protected opposition activity and *remand* this case, his retaliation claim *will* still fail for lack of a causal connection between his complaints and the elimination of the position.

(Emphasis added).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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